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THE LAST CLEAR CHANCE.

Defined.— The last clear chance is the last clear opportunity one has to avoid injury to another who has negligently placed himself, or his property, in a position of danger; or is the rule that notwithstanding the previous negligence of a plaintiff, he can recover if, at the time the injury was done, it might have been avoided by the exercise of reasonable care on the part of the defendant.[1]

Principle upon Which the Rule Is Founded.—The rule is founded on the rights of personal security, and the rights of private property, natural and absolute rights independent of the relation of men in society. The fear of public punishment as well as private damages operate to prevent the criminal invasion of these rights, while invasion of these rights resulting from negligence not criminal is prevented exclusively by fear of private damages. The enjoyment of this security is founded on natural

1. "The party who last had a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." 55 L. R. A. 419, note; C. & O. Ry. Co. *v.* Corbin, and authorities cited 4 Va. Appeals 69; Style *v.* Receivers of R. & D. R. Co., 24 S. E. 740 (N. C.); Kinger *v.* Omaha, etc., Ry. Co., 114 N. W. 571 (Neb.); Texas, etc., R. Co. *v.* Scarborough, 104 S. W. 408 (Tex.); 7 L. R. A. (U. S.) 132, note; 2 Thomp on Neg., § 1735; Zelenka *v.* Union Stockyard Co., 118 N. W. 103 (Neb.); Chinn *v.* City & Sub. Ry. Co., 207 U. S. 302; Inland, etc., Co. *v.* Zolson, 139 U. S. 551; G. T. Ry. Co. *v.* Ives, 144 U. S. 408; Washington and G. & R. *v.* Harmon, 147 U. S. 571; Houston & R. Co. *v.* Finn, 107 S. W. 94 (Tex.); San Antonio Traction Co. *v.* Kelleher, 107 S. W. 67; Beaty *v.* El Paso Electric Ry. Co. (Tex.), 91 S. W. 365; Texas, etc., Ry. Co. *v.* Breadon, 36 S. W. 410 (Tex.); Galveston, etc., Ry. Co. *v.* Murray, 99 S. W. 144, and authorities cited; Gregory *v.* Wabash R. Co., 101 N. W. 764, and authorities cited; McLamb *v.* Wilmington & W. R. Co., 29 S. E. 894, 898, 122 N. C. 862; Davies *v.* Mann, 10 Mees. & W. 545.

"Before the doctrine of the last clear chance can be invoked, it must be shown that the defendant has been guilty of negligence, either before or after the discovery of the peril constituting the proximate cause of the accident." So. Ry. Co. *v.* Bailey, 4 Va. Appeals 95.

justice and is sanctioned and demanded by public policy. It is necessary for the very existence of society, and every individual in his personal and property rights is entitled to the fullest protection that society can give. Everyone in society owes every other person the duty not to injure him or to invade his absolute rights of personal security, or rights of property; and no one, under any circumstances, can lawfully injure another willfully, recklessly or negligently without reasonable justification or excuse.[2]

However negligent and culpable may have been the actions of another which placed him, or his property, in peril, the law, in its regard for life and property, takes no account of this negligence, but says to him who has, or ought to have discovered the peril: "You cannot pursue your business at the expense of life or property, where, by the reasonable use of all the means in your power, you could avoid doing injury after you have discovered or ought to have discovered the peril of the person or property injured." The licensed destruction of persons, or property, negligently exposed to peril, is contrary to natural justice and public policy and cannot be recognized by the law.[3]

Not Inconsistent with the General Rule of Contributory Negligence.—The general rule is that when the negligence of the plaintiff or injured person and the negligence of the defendant are concurrent, efficient and proximate causes of the injury complained of, the plaintiff's negligence is a bar to recovery. The negligence of the defendant to sustain an action must be the controlling and connecting cause of the injury. If his negligence was remote or the injury was caused by the intervening negligence of another, there can be no liability on the defendant, for his act was not the immediate or proximate cause of the injury but was separate and distinct from it; and the remote negligence of the plaintiff will no more be considered as ground of defense than the remote negligence of the defendant as a ground for recovery. The plaintiff's negligence must be the proximate cause in the same sense in which the defendant's negligence must have been the proximate cause in order to give a right of action.

2. 1 Bl. Com. 129, et seq.; Id. 138, et seq.; Houston, etc., R. Co. *v.* Finn, 107 S. W. 94 (Tex.).

3. Beaty *v.* El Paso Electric Ry. Co. (Tex.), 91 S. W. 365.

Although the plaintiff was negligent, yet if he was injured by the defendant's subsequent or intervening negligence, the plaintiff's negligence would not be the proximate and immediate cause of the accident, and, therefore, no ground of defense.[4] The rule under consideration is not, as is generally supposed, an exception to the rule of contributory negligence.[5] There is no inconsistency between the rules and no conflict of principles.

Davies v. Mann.—The case of Davies *v.* Mann established the rule that the person who has the last opportunity to avoid injuring another, in person or property, is not excused by the negligence of any one else. This case has been much criticised but the principle enunciated has been almost universally approved. The case is commonly known as "The Donkey Case." Davies left his donkey fettered in the public highway so that it could not escape, and Mann, driving rapidly and carelessly, ran against the donkey and injured him. It does not appear from the case whether or not the driver saw the donkey in a position of danger in time to avoid injuring him; and it does not appear that the question was raised that it was an unlawful

4. 1 Shear. & Red. on Neg. (5th Ed.), § 61, et seq.; 7 A. & E. Ency. of L. 371; C. & O. Ry. Co. *v.* Corbin, 4 Va. Appeals 69; Richmond Traction Co. *v.* Martin, 102 Va. 209; Wooddell *v.* W. Va. Improvement, etc., Co., 38 W. Va. 33.

5. "When the doctrine (of the last clear chance) is stated in this form, it becomes apparent that it is not an exception to the general doctrine of contributory negligence, and that it does not operate to permit one to recover in spite of contributory negligence, but merely to relieve the negligence of the plaintiff or deceased, which would otherwise be regarded as contributory, from its character as such, and this result it accomplishes by characterizing the negligence of the defendant, if it intervenes between the negligence of the plaintiff, or deceased, and the accident, as the sole proximate cause of the injury, and the plaintiff's antecedent negligence merely as a condition or remote cause. The antecedent negligence of the plaintiff, or deceased, having been thus relegated to the position of a condition or remote cause of the accident, it cannot be regarded as contributory, since it is well established that negligence in order to be contributory, must be one of the proximate causes." 55 L. R. A. 419 note; Tanner *v.* Louisville, etc., R. Co., 60 Ala. 620; Button *v.* Hudson River R. Co., 18 N. Y. 249; Troy *v.* Cape Fear, etc., R. Co., 99 N. C. 298.

use of the highway for the plaintiff to have left his donkey fettered in the highway. There was a judgment for the plaintiff; and there is a possibility that there may have been error in the application of the principle, but that in no way affects the validity of the principle itself.[6]

The Application and Reason of the Rule.—The rule applies not only in cases where the defendant failed to avail himself of the last opportunity to save the plaintiff from harm on account of the defendant's reckless, wanton or willful acts, but also on account of the defendant's negligent acts. When the act on the part of the defendant is reckless, wanton or willful so as to show a depraved and criminal disregard of the rights of others, the contributory negligence of the plaintiff is never a defense, although such negligence may have been a concurrent cause of the accident.[7] However negligent a person may have been in getting in the way of and remaining in danger, his negligence is never a justification or an excuse for another to injure him. "Even the criminal is not out of the protection of the law, and is not to be struck down with impunity by other persons."[8] The criminal wrongdoer in no case can be relieved from liability for damages by any negligent act of the injured party, and the defense of contributory negligence cannot avail.

Contributory negligence, while never a defense to a criminal act, is always a defense to any act of negligence however gross, not criminal in its character.[9] When one has a last opportunity

6. Davies *v.* Mann, 10 Mees. & W. 545.

7. Rockenwold *v.* Metropolitan St. Ry. Co., 97 S. W. 55 (Mo.); Moon *v.* St. Louis Transit Co. (Mo.), 82 S. W. 390; Rodgers *v.* Transit Co. (Mo.), 92 S. W. 1155; Effsteine *v.* Railway Co. (Mo.), 94 S. W. 967; Ross *v.* Railroad, 113 Mo. 600, 88 S. W. 144; Essey *v.* So. Pac. R. Co., 37 Pac. 501 (Cal.); Green *v.* Los Angeles Terminal Ry. Co., 76 Pac. 719 (Cal.): "Where the conduct of the defendant is wanton and willful, or where it would indicate that degree of indifference to the rights of others which may be justly characterized as recklessness, the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts irrespective of the fault which placed the plaintiff in the way of such injury." 2 Cooley on Torts (3d Ed.) 1442 and authorities cited.

8. 2 Cooley on Torts (3d Ed.) 1443.

9. Negligence of a gross character is treated by courts and writers

to save another from harm and fails to exercise reasonable care to do so, his failure to exercise such care under the circumstances is abhorrent to the fundamental principles of the law and to the doctrine of common humanity, and can hardly be distinguished from criminal conduct, and upon principle it would be inconsistent with natural justice and contrary to public policy for the law, in such cases, to recognize contributory negligence as a defense. There are but comparatively few cases where a person has a last clear opportunity to save another from the consequences of his own negligence and fails to do so, that do not manifest such disregard for the rights of others as to be criminal in character. However, the failure of a defendant to avail himself of the last clear chance to save another may be mere negligence and then his liability will depend on whether or not his negligence was the controlling and proximate cause of the accident. The person injured may have been negligent in being in the place of danger and without which the accident would not have happened, but if his being there was a mere condition upon which the subsequent negligence of the defendant acted as the last link in the chain of causation, the antecedent negligence of the plaintiff in being in the place of danger would not be a proximate cause of the accident, concurrent with the negligence of the defendant and not a defense, and the defendant would be liable.[10] If, however, the plaintiff had had a last clear chance or opportunity to avoid the danger and neglected to exercise reasonable care to do so and was injured by the defendant, who, on his part, failed to avail himself of the last clear chance to save the plaintiff from harm, then the negligence of the plaintiff and the defendant would have been concurrent and proximate causes of the accident, and the negligence of the plaintiff would be a bar to recovery.[11]

When a person is in a place of danger from which he cannot

on criminal law as criminal, but the law of negligence in civil cases does not recognize criminal negligence, as in no case of a criminal character can the contributory negligence of the plaintiff, or the deceased, be considered as a defense.

10. C. & O. Ry. Co. *v.* Corbin, 4 Va. Appeals 69; 2 Shear. & Red. on Neg. 484.

11. So. Ry. Co. *v.* Bailey, 4 Va. Appeals 86.

extricate himself, he cannot be held to be negligent for not doing what was impossible for him to do, nor would he be any more negligent in not getting out of the way of danger that he was not conscious of. And in either case, if the defendant had notice in time to avoid injury by the exercise of reasonable care and did not exercise such care and injury resulted, the defendant's negligence would be the proximate cause and he could not escape liability.[12]

The rule applies not only where the peril of a person is discovered, but also where it could have been discovered by the exercise of reasonable care, as where it was the duty of the defendant to be on the lookout. The defendant is liable not only for what he knew, but for what he ought to have known or was in duty bound to know, but the application of the rule always requires an intervening space of time in which the defendant could act if he knew or ought to have known.[13] However, where the plaintiff's negligence consisted merely in the failure to discover the danger and the defendant's negligence consisted in the like failure, the negligence of the plaintiff and defendant would necessarily be concurrent and proximate causes of the injury, and there could, upon principle, be no recovery.[14]

Where a Trespasser's Peril Is Not Discovered.—It is not the duty of an owner to be on the lookout for trespassers, and where there is no duty owed there can be no negligence, for negligence is the breach of a duty; and therefore, if a trespasser is in a position of danger and his peril is not discovered and he is injured by the owner, there is no liability for the injury, except where the act in injuring the trespasser was willful, reckless or wanton. When a person trespasses upon premises, he assumes all ordinary risks of danger, and if he is injured, it is his own fault and no one is liable on the ground of negligence where his peril was not discovered in time to avoid doing him injury. This is not true, however, where the owner had placed upon his premises agents that were liable to kill or injure any person going on the premises, such as spring guns and instruments of that char-

12. 1 Shear. & Red. on Neg., § 99; and 2 Id., § 483.
13. 2 Shear. & Red. on Neg. 484.
14. So. Ry. Co. *v.* Bailey, 4 Va. Appeals 86.

acter, or had made dangerous pitfalls to entrap persons going on the grounds.[15]

Where a Trespasser's Peril Is Discovered.—When a trespasser is discovered in danger and it is apparent that he is unconscious of his peril, or is in such a place or in such a condition that he cannot escape, then it becomes the duty of the owner to use all the means in his power to avoid injuring the trespasser—the fact that a human being is in danger requires the owner to do all in his power that can be done to save him from harm, and after his peril is known, the owner owes to him as high a duty as to anyone else. If a person, however, is seen walking along on a railroad track, he is presumed to be in his senses and to know of the danger. The railroad track is itself a proclamation of danger, and it is his duty to be on the alert and on the lookout for danger from passing trains. And when the engineer sees a person on the track ahead of him, walking along, he has the right to presume that that person knows of the danger and that a train is approaching him from behind, and that he will get off the track in time to avoid injury from the train, and the engineer is not strictly required to do anything, to ring the bell, to sound the whistle, or to give any alarm whatever, or to check up or stop the speed of his train, until from the appearance of such person, it is apparent that he is unconscious of his danger and will not get out of the way, but when this does become apparent, it is the duty of the engineer to use all the means in his power to avoid injuring such person, though a trespasser, and when the trespasser's peril is discovered, the engineer owes him just as high a duty as he would owe to the same person if he were a licensee, invitee, servant or even a passenger.[16]

There must be an appreciable time for the engineer to act after he has discovered the peril of the person walking on the track and that he is unconscious of the danger, and if the engineer then does not act and injury is done, he is guilty of a

15. Big. on Torts, 355; 1 Thomp. on Neg. 950; 1 Shear. & Red. on Neg. 97; 2 Id. 705; Clarke *v.* Richmond, 83 Va. 355; Ritz *v.* Wheeling, 45 W. Va. 262.

16. 2 Shear. & Red. on Neg., § 483; C. & O. Ry. Co. *v.* Corbin, 4 Va. Appeals 69.

breach of common humanity and his company is liable for his act. It is sometimes plausibly urged that there could be no liability on the railroad company in this case because the person injured knew of the danger of the place, and it was his duty to listen and lookout for a train that might come up behind him, and his failure to look and listen was negligence on his part that continued up to the time of the collision, and was the concurrent, proximate cause of the mischief done him, unless the conduct of the engineer could be shown to be of a criminal character, such as that for which contributory negligence would not be a defense. If the engineer acted criminally there would be, no doubt, cause for liability, as no negligence of the injured person could be set up as a defense, and there could be no justification or excuse, under the law, for injuring the person because of the fact that he was a trespasser. The question, however, as to the liability of the railroad company in the question of the negligence of both parties being the proximate cause of the injury, is one upon which courts have differed, but the great weight of authority is that, where the engineer had an interval of time sufficient for him to act after he realized that the trespasser was unconscious of the danger and would not get out of the way and neglected to act, there is liability. The engineer, after he knew the danger, had an opportunity to avoid it. The engineer knew of the danger and the trespasser did not know of it. The engineer's negligence was after he had notice of the danger, and the negligence of the trespasser was in being in a place of danger, but without notice or knowledge of the immediate danger—his was a passive unconscious state of being or condition, and the engineer's was conscious and active. It was the duty of the engineer to give the trespasser notice and a chance for his life, or to stop or slow up the train, and it was the duty of the trespasser, upon notice of the danger, to get out of the way, and the breach of the engineer's duty was, therefore, not concurrent with the negligence of the trespasser to get out of the way of the active danger from the engineer's train, for he could not be held to be negligent at that time in getting out of the way of the train that he did not know was approaching him. His negligence was prior antecedent negligence in being there in that state or condition and the engineer's negligence was active sub-

sequent negligence without which the collision would not have happened. The engineer had a last clear chance to avoid the injury, to avert the danger, and the trespasser did not have such chance to get out of the way. The negligence of the engineer was the last link in the chain of causation. The negligence of the engineer was, therefore, the proximate cause of the injury and the negligence of the trespasser the remote cause. The law is founded on principles of humanity, and to hold that there would not be liability would be an inhuman and cruel doctrine. When the actual peril of such person is discovered, it is rarely that the train can be stopped in time to avoid a collision, and the presumption is that, if the whistle is sounded or proper alarm is given, he will go out of danger, and if the engineer does this when his train cannot be stopped or slowed up so as to avoid a collision, it is all that can be required of him, and if the person is injured or killed, the railroad company is not liable.

Licensees Whose Peril Is Not Discovered.—It is the duty of an owner to keep a lookout for persons on its premises by license or invitation or under contractual relations, and where one is injured by reason of the fact that such lookout was not kept, and this failure on the part of the owner was the proximate cause of the injury, the owner is liable just as if he had actually seen the peril. As it was his duty to see, the law presumes that he saw the peril, and if he neglected to look out, that was a breach of his duty, and the cause of the injury, and he is liable for the injury if the plaintiff or the plaintiff's intestate was not guilty of concurrent negligence so as to defeat his right to recover.

If, for illustration, the plaintiff, or the person injured or killed was on a defendant railroad company's track by license or right, it would be the duty of the defendant in operating its trains to keep a lookout for such person, and a failure to do this would be a breach of its duty, for which it would be liable if such breach of its duty was the proximate cause of the injury done. And wherever the defendant's railroad track is used as a common walkway, or where its track is used by persons as invitees or by persons standing in a contractual relation with the company, it is the duty of the company's servants, in operating its trains, to keep a reasonable lookout for persons along the track

and if injury is done by the failure of this duty, as the proximate cause, the company is liable.

If persons are disabled on a licensed part of a railroad track, or in such place or condition that they cannot escape from danger, the railroad company is bound to keep a lookout for these persons. It is expected to anticipate that such persons may be on the licensed parts of its track and is required to keep a lookout for them, and if it fails to keep this lookout, it is liable, for the negligence of the persons on the track is antecedent negligence, and the negligence of its engineer or servants, in not keeping a lookout is subsequent negligence, and the last link in the chain of causation, and the proximate cause of the injury.

It is sometimes urged that persons lying on the track, drunken or asleep, cannot be licensees, although on a licensed part of the track, and are trespassers for the reason that the railroad company never gives a license to persons to lie down on its track. But the chief reason for requiring the company to keep a lookout along the licensed parts of its track is to avoid injuring persons who are liable to fall by the wayside from drunkenness or disease, for it is reasonable to anticipate that where the track is a common walkway, persons are liable to be there in a disabled condition, and it is for such disabled persons and for infants of tender years that the lookout is specially required; and although the engineer may not be reckless and wanton in his conduct in not looking nor in the manner of running his train, but merely negligent in not keeping a lookout and on account of that runs over and injures a person on its track, who is there in a helpless condition or in such a position that he could not get out of the way of danger, or a child of tender years, the company could not escape liability.

But where a person injured knew of the danger along the track, knew that a train was liable to come up behind him at any time along the track and injure or kill him, it was his duty to keep a lookout and it was as much his duty to keep a lookout for his own safety as it was the duty of the engineer to keep a lookout for him, and if he and the engineer both failed to keep such lookout and their concurrent breach of this duty or negligence to

look caused the injury, there could be no recovery. If, however, it would have been recklessness, or wantonness for the engineer not to have kept a lookout along the place where the injury happened to the plaintiff, then the negligence of the plaintiff would not be a defense and there could be no recovery. Where, therefore, a railroad company knows that its track is constantly used, day and night, by pedestrians as a common and general walkway, and it runs a train over this track at an unusually rapid rate of speed, without keeping a lookout, it is believed that such conduct is not mere negligence, but criminal in its character, as to which, the negligence of the person injured would be no defense. If a railroad permits men, women and children to use its track as a common and general walkway, as a public street is used, it cannot operate its trains without regard to this. It is its duty to keep a lookout and to regulate its trains accordingly, and if it fails to keep a lookout and to run its trains at the usual speed, this would be such reckless and wanton conduct for which the company could not escape liability, and liability of railroad companies for such acts ought to be strictly enforced as a matter of principle, and of public policy.

Where a Trespasser's Peril Is Discovered.—An owner owes the duty to all persons alike to exercise reasonable care not to injure them after he has discovered their peril, and what has been said *supra* as to trespassers whose peril has been discovered, applies to licensees, invitees and even to passengers.

The Rule Applicable to Property.—The last clear chance rule applies not merely to persons, but also to property, and wherever a person, by the exercise of reasonable care, can avoid injury to the property of another, or has the last clear chance to avoid injuring it, it is his duty to do so, no matter how negligent the owner may have been in allowing the property to be in a place of danger.[17]

Conclusion.—A defendant is not liable for injury to a trespasser unless he discovered the trespasser's peril in time to have avoided injuring him by the exercise of reasonable care, unless the defendant's conduct was willful and wanton; but he is liable to a licensee or to a person on his property by right for not dis-

17. 2 Shear. & Red. on Neg., §§ 437 and 438.

covering his peril where his failure to discover was the proximate cause of the injury; and in either case the defendant is liable if he knew the danger and could have avoided it by the exercise of ordinary care, and his failure to do so was the proximate cause of the injury complained of. But where the negligence of the injured party and the negligence of the defendant were concurrent and efficient proximate causes of the injury done, then there is no liability. And in any case where there is material evidence to support the theory of the last clear chance, the liability of the defendant is a question exclusively for the jury.

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